

May 19, 2005

Huston T. Carlyle Jr.
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Re: Your Request for Advice
Our File No. A-05-081

Dear Mr. Carlyle:

This letter is in response to your request on behalf of Councilmember Rikke Van Johnson for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTION

Is Councilmember Rikke Van Johnson disqualified from voting and making, participating in making, or using or attempting to use his official position to influence the outcome on agenda item(s) coming before the San Bernardino City Council/Community Development Commission which involve real property owned by a relative who is also the sole owner of a company which employs Councilmember Johnson?

CONCLUSION

Councilmember Johnson is disqualified from taking any part in these decisions, because it is reasonably foreseeable that these decisions would have a material financial effect on his aunt and employer, Ms. Bonnie Johnson.

FACTS

Councilmember Rikke Van Johnson was elected in the November 2003 election. He is also the sole employee and the manager of a bail bonds company wholly owned by

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

his aunt, Ms. Bonnie Johnson, who is doing business under the name of Greenwood Bail Bonds, a business located in the City.

Councilmember Johnson and his aunt are the only persons on the Greenwood Bail Bonds payroll. Councilmember Johnson is a salaried, at-will employee, who is paid twice a month. His annual salary is considerably in excess of \$500.

In her individual capacity, Ms. Johnson owns a parcel of real property in the City, which currently is the subject of purchase and sale negotiations and/or eminent domain proceedings with the City's Redevelopment Agency. This property is located more than 500 feet from Councilmember Johnson's residence and his place of business, Greenwood Bail Bonds.

The Redevelopment Agency's governing body is the San Bernardino Community Development Commission, composed of the mayor and city council. Any agreement negotiated relative to this property would require Commission ratification. If no agreement is reached, authorization to initiate eminent domain proceedings would require Commission approval after a public hearing. As previously noted, Councilmember Johnson is a member of the Commission by virtue of his position on the city council.

The property at issue in these proceedings has been appraised at approximately \$75,000. Ms. Johnson, as owner of the property, is asking for \$350,000. Councilmember Johnson indicates that his salary and/or annual income would not be affected by the money received by his aunt for the subject real property.

ANALYSIS

Your question concerns the Act's conflict-of-interest provisions. Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the official's economic interests. (§ 87103; reg. 18700(a).) The Commission employs an eight-step analysis for determining whether an official has a disqualifying conflict of interest in a governmental decision. (Regulation 18700(b)(1)-(8).)

Step One: Is Councilmember Johnson a Public Official?

The Act's conflict-of-interest provisions apply only to "public officials." (§§ 87100, 87103; regulation 18700(b)(1).) A "public official" is "every member, officer, employee or consultant of a state or local government agency...." (§ 82048.) As a member of the city council, Councilmember Johnson is a public official subject to the Act's conflict of interest rules.

Step Two: Will Councilmember Johnson Be Making, Participating In Making, Or Using His Official Position To Influence A Governmental Decision?

The Act's conflict of interest provisions come into play only when a public official makes, participates in making, or in some way attempts to use his or her official position to influence a governmental decision in which the official knows – or has reason to know – that he or she has a financial interest. (§ 87100.)

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

Your question presupposes that, unless disqualified by conflict of interest rules, Councilmember Johnson will make, participate in making, or use his official position to influence a governmental decision regarding negotiation of a real property purchase agreement and/or an eminent domain proceeding against the property.

Step Three: What Are Councilmember Johnson's Economic Interests?

There are six kinds of economic interests recognized under the Act. Those potentially relevant to the facts you describe are the following:

- A public official always has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (§ 87103(c); Reg. 18703.3).
- A public official has an economic interest in any business entity in which he or she is an officer, director, partner, trustee, employee, or holds any position of management. (§ 87103(d); Reg. 18703.1.)
- A public official has an economic interest in his or her personal finances, including those of his or her immediate family – this is the “personal financial effects” rule (§ 87103; Reg. 18703.5).

You advise that Councilmember Johnson is employed by Greenwood Bail Bonds, a business entity paying him a salary “considerably in excess” of \$500 per year. It seems clear then that Councilmember Johnson has an economic interest in this business entity.

You have not offered any details on the legal form of this business entity, whether it is a wholly-owned corporation or a sole proprietorship, for example. But you indicate that the business is wholly owned by Ms. Johnson, and your account of the facts does not suggest that any person other than Ms. Johnson directs or controls its business decisions. You describe Councilmember Johnson as an at-will salaried employee, and you state that there is no third person on the payroll.

Assuming that Ms. Johnson is the sole owner of Greenwood Bail Bonds and that she is the person who controls the business, we must conclude that Ms. Johnson *herself* is a source of income to Councilmember Johnson. The Commission has long advised that when the ownership and control of a business entity is vested in a single person, that person herself will be regarded as a “source of income” under the Act in addition to the business entity she owns and operates. See generally *In re Nord*, (1983) 9 FPPC Ops. 6, and the *Korb* Advice Letter, No. A-99-113.

You have told us that Councilmember Johnson’s salary and annual income will not be affected by any decision on Ms. Johnson’s real property, and you have not offered any other reason to believe that this decision would have a personal financial effect on Councilmember Johnson or members of his immediate family, so we will not consider “personal financial effects” further.²

Step Four: Will Councilmember Johnson’s Economic Interests Be Directly Or Indirectly Involved in Governmental Decisions?

The Act’s conflict of interest rules distinguish between economic interests that are directly involved in governmental decisions, and those that are only indirectly involved.

Regulation 18704.1(a) provides:

“(a) A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official’s agency when that person, either directly or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

² “Immediate family means the spouse and dependant children.” (§ 82029.) Financial effects on his aunt, Ms. Johnson, therefore would not disqualify Councilmember Johnson as “personal financial effects.”

In all other cases, persons that are sources of income will be “indirectly” involved in the decision. As you describe the circumstances, Ms. Johnson will be a named party in, and her real property the subject of, any negotiation for purchase of the property, and of any subsequent decision regarding eminent domain proceedings against the property.³ Ms. Johnson and her real property are therefore directly involved in the governmental decisions you describe.

Steps Five and Six: At What Point Does The Effect Of A Governmental Decision On These Economic Interests Become Material, and Is it Reasonably Foreseeable That The Effects Will Be Material?

The next step involves determining the materiality standard applicable to Councilmember Johnson’s economic interests, as established by regulations 18705 et seq. After determining the level of economic effect considered to be “material” for each economic interest, we must then decide whether it is “reasonably foreseeable” that the effect of a given decision on a given economic interest will be “material.” (Regulation 18700(b)(6).) An effect is considered “reasonably foreseeable” if it is “substantially likely.” (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) Whether the financial consequences of a governmental decision are “substantially likely” at the time the decision is made depends on the specific facts surrounding the decision. A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Id.*)

Absent exceptions which do not apply to the circumstances you have described, *any* financial effect on a source of income which is a business entity directly involved in a governmental decision is presumed to be material (regulation 18705.1(b)(1)). As to Ms. Johnson, *any* financial effect is deemed to be material under regulation 18705.3(a). The presumption regarding effects on the business entity may be rebutted by contrary evidence. However, it is Ms. Johnson, not Greenwood Bail Bonds, who owns the real property at issue. Our focus is thus on Ms. Johnson, and Regulation 18705.3(a) conclusively provides that any financial effect on her would be material.⁴

Since the inevitable outcome of any transfer of Ms. Johnson’s real property, whether by purchase under a negotiated agreement or through eminent domain, is a payment to Ms. Johnson ranging from \$75,000 to \$350,000 in exchange for her rights in

³ When a parcel of real property is the subject of the kinds of governmental decisions at issue here, the owner of that real property is necessarily a party to the proceedings and thus is directly involved in that decision. (See, e.g., the *Hallinan* Advice Letter, No. A-00-282.)

⁴ There is also a separate materiality provision which applies in cases where there is a “nexus” between duties owed by a public official to a source of income and to the official’s public agency. This rule is applicable when a public official is paid by a private person to accomplish some action within the official’s public decisionmaking authority. (Regulation 18705.3(c).) However, the nexus standard does not apply in the present case since it does not appear that Councilmember Johnson is being paid by Ms. Johnson to assist in her real estate sales negotiations or any subsequent eminent domain proceedings.

the real property, it is reasonably foreseeable that governmental decisions on the transfer would have a material financial effect on Ms. Johnson. Councilmember Johnson then would have a conflict of interest in such decisions.

Steps Seven and Eight: Exceptions.

An official who might otherwise have a conflict of interest in a particular decision may still participate in that decision if the circumstances are such that an exception to the conflict of interest rules might apply. The “public generally” exception may be invoked when the financial effect of a decision upon a public official's economic interests is not distinguishable from the effect of the decision on a significant segment of the public generally. (Section 87103; regulation 18707(a).) Your account of the facts does not suggest that the “public generally” exception might apply in this case.

An official with a conflict of interest may still participate in the decision under the “legally required participation” exception. This is an exception that typically applies when an agency is unable to assemble a quorum of its members without participation of an official who has a conflict of interest. Again, you have not suggested that this exception need be considered at present.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

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